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Brackeen v. Zinke

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Brackeen v. Zinke, ___F. Supp. 3d___, 2018 U.S. Dist. LEXIS 173115, 2018 WL 4927908 (N.D. Tex. Oct. 4, 2018)

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In 1978, Congress enacted the Indian Child Welfare Act to counter practices of removing Indian children from their homes, and to ensure the continued existence of Indian tribes through their children. The law created a framework establishing how Indian children are adopted as a way to protect those children and their relationship with their tribe. ICWA also established federal standards for Indian children being placed into non-Indian adoptive homes. *Brackeen v. Zinke* made an important distinction for the placement preferences of the Indian children adopted by non-Indian plaintiffs; rather than viewing the placement preferences in ICWA as based upon Indians' political classification, the United States District Court for the Northern District of Texas viewed the preferences as based upon a racial classification, to which strict scrutiny applies. The court concluded that ICWA was unconstitutional, potentially opening the door to allow the same abusive practices to resurface in regard to removal and adoption of Indian children.

I. INTRODUCTION

Brackeen v. Zinke centers around the Indian Child Welfare Act ("ICWA"), a statutory scheme passed in 1978, in response to a crisis of Indian children being separated from their Indian families by child welfare and adoption agencies.[1] ICWA created a framework for how children are removed from their Indian families, and the procedures to be used in adoptions involving Indian children.[2] States' receipt of child welfare funding is contingent upon compliance with the ICWA framework.[3]

Several parties comprise the plaintiffs in this case, including the states of Texas, Louisiana, and Indiana (collectively, "State Plaintiffs"), whose compliance with ICWA is mandated, and several individual non-Indian families and persons— the Brackeens, the Librettis, the Cliffords, and Ms. Hernandez (collectively, "Individual Plaintiffs") (together with the State Plaintiffs, "Plaintiffs")— who were in the process of adopting Indian children.[4] Plaintiffs motioned for summary judgment on their claims contesting the constitutionality of ICWA.[5] In addition, Plaintiffs challenged a Bureau of Indian Affairs ("BIA") regulation passed to

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1. Brackeen v. Zinke, ___F. Supp. 3d___, 2018 U.S. Dist. LEXIS 173115, 2018 WL 4927908 (N.D. Tex. Oct. 4, 2018).
2. *Id*. at *2 (citing 25 U.S.C. § 1901, *et seq.*(2012)).
3. *Id*. at *3.
4. *Id*. at *1.
5. *Id*.

implement statutory provisions of ICWA ("Final Rule"), claiming it violated the Administrative Procedure Act ("APA").[6]

Numerous parties defended against Plaintiffs' claims, including the United States, the Department of the Interior ("DOI"), the DOI Secretary, the Department of Health and Human Services ("HHS"), the HHS Secretary, the BIA, and the BIA Director and Principal Assistant Secretary for Indian Affairs (collectively, "Federal Defendants"), and four Indian tribes—the Cherokee Nation, the Oneida Nation, the Quinalt Indian Nation, and the Morengo Band of Mission Indians, (collectively, "Tribal Defendants") (together with the Federal Defendants, "Defendants").[7] The Defendants based their arguments on the holding in *Morton v. Mancari*,[8] and contended that the classification used to identify the Indian children under ICWA was politically, not racially, based.[9] The Federal Defendants also argued the constitutional authority vested in ICWA permissibly comes from the Indian Commerce Clause, and that the Final Rule promulgated by BIA was owed deference from the court.[10]

The court ultimately granted in part and denied in part Plaintiffs' summary judgment motion, holding ICWA violated equal protection principles, the anti-commandeering doctrine of the Tenth Amendment, and the non-delegation doctrine of Article I.[11] As to the administrative law claims, the court declared BIA was not entitled to deference for its Final Rule interpreting ICWA, and BIA violated the APA by exceeding its statutory authority.[12] However, the court declined to grant summary judgment on Plaintiffs' Fifth Amendment due process claim.[13]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. ICWA Framework

"Th[e] framework [of ICWA] establishes: (1) placement preferences in adoptions of Indian children; (2) good cause to depart from those placement preferences; (3) standards and responsibilities for state courts and their agents; and (4) consequences flowing from noncompliance with the statutory requirements."[14] "[P]lacement preferences in foster care, preadoptive, and adoptive proceedings involving Indian children" are mandated by ICWA, and without good cause to deviate from those preferences, the following hierarchy must be observed in adoptive placements: "(1) a member of the child's extended

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6. *Id*. at *2.
7. *Id*. at *1.
8. 417 U.S. 535 (1974).
9. *Brackeen*, 2018 WL at *11.
10. *Id*. at *17.
11. *Id*. at *14, *15, *18.
12. *Id*. at *18, *22.
13. *Id*. at *22.
14. *Id*. at *2 (*see* 25 U.S.C. § 1901 *et seq*.).

family; (2) other members of the Indian child's tribe; or (3) other Indian families."[15] For two years after non-Indians successfully petition for adoption of an Indian child, that adoption may still be collaterally attacked under ICWA.[16] A strict notification process must be followed in matters involving Indian children, the structure of which is determined by the type of proceeding at hand.[17]

B. Final Rule

Accompanying regulations to ICWA—the Indian Child Welfare Act Proceedings ("Final Rule")—were promulgated and officially passed by BIA in 2016 to provide minimum standards to parties involved in implementing the requirements of ICWA. The Final Rule represented a transition from a 1979 guideline, and commanded that "[t]he party urging that the ICWA preferences not be followed bears the burden of proving by clear and convincing evidence of good cause" to deviate from the child placement hierarchy.[18]

BIA also provided courts with five factors to consider when evaluating whether the "good cause exception" has been met.[19] Placement preferences may be circumvented if adopters prove the child's best interest lies outside those preferences.[20] The Final Rule changed the 1979 guidelines from a suggested course of action for courts to binding regulation, forcing courts to interpret the good cause exception as "narrow and limited in scope."[21]

C. The Adoption Proceedings

The Brackeens, one of the families making up Individual Plaintiffs, argued they had good cause to adopt an Indian child, and were thus entitled to circumvent the placement preferences of ICWA.[22] Ultimately, the Indian tribes of the child's biological parents did not intervene with the final adoption proceedings and the Brackeens' adoption was completed.[23] The second family, the Librettis, together with another Indian child's biological mother, Ms. Hernandez, agreed to a settlement

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15. *Id*. (quoting 25 U.S.C. § 1915(a)).
16. *Id*. at *3.
17. *Id*. at *3; *See* 25 U.S.C. § 1912.
18. *Id*. at *3.
19. *Id*. (citing Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,838, 39,839 (June 14, 2016)). These five factors include the request of parents, the request of the child, sibling attachment, the extraordinary physical, mental, or emotional needs of the child, and the unavailability of a suitable preferred placement. FR § 23.132(c).
20. *Id*. at *2.
21. *Id*. at *4 (quoting Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,839).
22. *Id*. at *7.
23. *Id*.

with her tribe for the adoption of the child.[24] The third family, the Cliffords, fostered an Indian child and were attempting to adopt when the child was removed and preferentially placed with their biological grandmother.[25] The placement was against the consent of the family and without the support of the child's guardian ad litem, and the child remained separated from the Cliffords.[26] The Individual Plaintiffs' adoptions were considered "successful."[27] However, under ICWA, the adoptions remained subject to collateral attack for up to two years.[28]

III. ANALYSIS

The court addressed six principal issues: (1) whether ICWA violated the Fifth Amendment's equal protection requirements; (2) whether ICWA's delegation of congressional enforcement power to Indian tribes violated Article I of the U.S. Constitution; (3) whether ICWA, together with the Final Rule, violated the anti-commandeering doctrine of the Tenth Amendment; (4) whether the Final Rule violated the APA; (5) whether ICWA violated the Fifth Amendment's due process clause; and (6) whether the scope of the Indian Commerce Clause limited Congress' authority to pass certain provisions in ICWA.[29]

A. Fifth Amendment Equal Protection Claim

The court first addressed Plaintiffs' Fifth Amendment equal protection claim.[30] Plaintiffs argued that certain sections of ICWA violated the Fifth Amendment because those sections relied upon racial classifications, thereby subjecting reviews under ICWA to strict scrutiny.[31] Because ICWA subscribes certain rules where the child in a placement proceeding is Indian, Plaintiffs argued the law makes a race-based distinction that is unconstitutional unless the government can provide a compelling, narrowly tailored interest justifying the statute's existence.[32] Conversely, Defendants argued that ICWA's child placement requirements classified Indian children based on their political category, as permitted by *Morton v. Mancari*,[33] and reviews of political class-based distinctions should receive the more easily satisfied rational basis scrutiny.[34]

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24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at *2.
30. *Id.* at *10.
31. *Id.*
32. *Id.* at *11.
33. 417 U.S. 535 (1974).
34. *Brackeen*, 2018 WL at *11.

ICWA "defines an Indian child as one who is a member 'of an Indian tribe' as well as those children simply *eligible* for membership who have a biological Indian parent."[35] Because ICWA does not rely solely on actual tribal membership, but also includes those children who are eligible to become tribal members, the court felt the facts in the case closely resembled those in *Rice v. Cayetano*,[36] and should be examined using strict scrutiny.[37] Due to the Federal Defendants failure to detail the governmental interests served by ICWA, the court found ICWA's application of a blanket placement preference to any Indian, regardless of tribal membership, did not survive strict scrutiny analysis.[38] As such, the court held that the placement preferences within ICWA were unconstitutional because it violated the equal protection requirements of the Fifth Amendment.[39]

B. Article I Non-Delegation Claim

The non-delegation doctrine determines how and to whom congressional power may be given.[40] The State Plaintiffs argued that Congress' delegation of power to Indian tribes under ICWA was a violation of constitutional authority.[41] Congress may grant federal agencies regulatory power to execute law, but may not "plainly delegate" congressional authority to create legislation.[42] Through ICWA, Congress granted Indian tribes the power to modify legislative placement preferences, in favor of the tribes' own preferences.[43] The court applied the intelligible principle test to determine if Congress' delegation authority to Indian tribes under ICWA was proper.[44] The court ultimately held that the power delegated to Indian tribes in ICWA violated the non-delegation doctrine because the power was legislative in nature.[45] However, the court found that even if the structure of the delegation was proper, Indian tribes did not qualify as a federal branch of government, and were therefore unqualified to receive congressional delegations.[46] Accordingly, the court

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35. *Id*. at *12 (emphasis in original).
36. 528 U.S. at 519.
37. *Brackeen*, 2018 WL at *12. The court failed to expand upon certain facts in from *Rice*, including that the case involved Native Hawaiian tribes which are not federally recognized. The court still distinguished the facts in *Brackeen* from those in *Mancari*, where preference was permissibly given to Indian applicants of the BIA. *See id.*
38. *Id.* at *13.
39. *Id*. at *14.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*. at *15 (citing 25 U.S.C. § 1915(c)).
44. *Id*. at *14.
45. *Id*. at *15.
46. *Id*.

ruled Congress' delegation under ICWA, and the accompanying Final Rule, were unconstitutional under Article I of the constitution.[47]

C. Tenth Amendment Anti-Commandeering Claim

Plaintiffs also challenged provisions of ICWA as unconstitutional under the Tenth Amendment's anti-commandeering doctrine.[48] "The anti-commandeering principle 'is simply the expression of a fundamental [Constitutional] structural decision . . . to withhold from Congress the power to issue orders directly to the states.'"[49] In its analysis, the court relied upon *Murphy v. National Collegiate Athletic Association*.[50] In *Murphy,* the U.S. Supreme Court provided three principles outlining the importance of the anti-commandeering doctrine: (1) "it is 'one of the Constitution's structural protections of liberty'"; (2) it "promotes political accountability"; and (3) "it 'prevents Congress from shifting the costs of regulation to the States.'"[51]

The court held ICWA violated all three of the *Murphy* principles by "commanding States to impose federal standards in state causes of action," by the "blurred" responsibility the public could perceive between state courts "responsible for federally-mandated standards," and by the cost-shifting burden placed on states enforcing ICWA.[52] Defendants' arguments against a Tenth Amendment violation—based on the Indian Commerce Clause and principles of state law preemption—proved unpersuasive.[53] According to the court, ICWA's infringements upon States ultimately constituted commandeering because "Congress shift[ed] all responsibility to the States, yet 'unequivocally dictate[d]' what they must do.'"[54]

D. Administrative Procedure Act Claims

Plaintiffs also argued that the Final Rule violated the APA by: "(1) purport[ing] to implement an unconstitutional law"; "(2) exceed[ing] the scope of [DOI]'s statutory regulatory authority under the ICWA; (3) reflect[ing] an impermissibly ambiguous construction of the statutes"; and (4) being "otherwise arbitrary and capricious."[55] Because the court granted the other motions for summary judgment, the corresponding sections of

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47. *Id.* (citing Mistretta v. United States, 488 U.S. 361, 372 (1989).
48. *Id.* at *15.
49. *Id.* at *16.
50. 138 S. Ct. 1461 (2018).
51. *Id.*; *Brackeen*, 2018 WL at *17.
52. *Id.*
53. *Id.* at *18.
54. *Id.*
55. *Id.*

the challenged Final Rule were set aside after examining the language of the APA.[56]

State Plaintiffs argued the Final Rule mandated state courts and agencies to employ certain placement preferences without regard to the child's best interest, and was beyond the scope of the statutory authority possessed by BIA.[57] Finally, Defendants attempted to counter Plaintiffs' arguments by urging the court to apply *Chevron* deference, therein upholding the Final Rule.[58] Defendants argued BIA introduced the Final Rule in 2016 so states would uniformly comply with ICWA in a manner "consistent with the Act's express language."[59] The court declined to afford Defendants with *Chevron* deference because the Final Rule unnecessarily changed earlier guidelines into binding regulation, and was therefore beyond the statutory authority granted by Congress to implement and enforce provisions of ICWA.[60] For these reasons the court granted summary judgment for Plaintiffs on their APA claims.[61]

E. Fifth Amendment Due Process and Indian Commerce Clause Claims

Individual Plaintiffs also claimed a Fifth Amendment violation under the due process clause because ICWA inhibited their abilities as foster families to make fundamental decisions about the "care, custody, and control of their children."[62] The court held that this fundamental right had never been extended to foster families, and denied the motion for summary judgment.[63] Lastly, Plaintiffs asserted Congress lacked the constitutional authority to pass certain substantive portions of ICWA.[64] Defendants argued that the Indian Commerce Clause granted Congress plenary power over Indian tribes and thus permitted Congress to pass the ICWA provisions in question.[65] The court again applied the *Murphy* standard and held that Congress did not have the authority to directly order the States in this way.[66]

IV. CONCLUSION

Brackeen v. Zinke ultimately held substantive portions of ICWA as unconstitutional. If upheld on appeal, it has major implications for the future protection of inherent tribal sovereignty— reduced protections in

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56. *Id*. at *20.
57. *Id*. at *8.
58. *Id*.
59. *Id*. at *4 (citing 25 C.F.R. § 23.101).
60. *Id*. at *20.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*.
65. *Id*.
66. *Id*. (citing *Murphy*, 138 S. Ct. at 1479).

Indian child adoptions by non-Indian families, the progeny of decisions that will follow, and a disregard for the protection of federal Indian law norms which protect the unique status enjoyed by Indian people and tribes. Without the safeguards of ICWA, the historically rampant injustices ICWA was created to prevent could go unchecked once again.